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CHARLES ELMORE DROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. **294**.

SOUTHEASTERN BUILDING CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals, Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals,
Fifth Circuit.

To: the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

The petition of Southeastern Building Corporation respectfully shows to this Honorable Court:

A.

**SUMMARY STATEMENT OF MATTER
INVOLVED.**

The cause herein was originally instituted by Southeastern Building Corporation by the filing with the Tax Court (then the United States Board of Tax Appeals) a petition in conventional form (R. 1). The cause subsequently

went to trial upon an amended petition (R. 5) wherein it was alleged that the Commissioner erred in including in the gross income of the Petitioner for the year 1939 the sum of \$2,700 which he had denominated as "gain on retirement of bonds" and had further erred in allowing to the Petitioner depreciation in said year in the sum of only \$3,291.90, whereas the Commissioner should have allowed depreciation including obsolescence in the sum of \$9,436.97. The Commissioner, Respondent herein, in due course filed his amended answer to the amended petition (R. 18) denying in substance the errors alleged in the amended petition and setting up certain new matters not now pertinent in this proceeding. Thereafter, Petitioner herein filed its reply to the amended answer to amended petition (R. 26), being in substance a denial of the new matters alleged in Respondent's amended answer.

The cause came on for hearing before the Tax Court on May 14 and 15, 1943 (R. 3), at which time the parties presented their evidence, and thereafter and on or about February 29, 1944, the Tax Court made its findings of fact and rendered its opinion (R. 32-47). Subsequently, under date of May 18, 1944, the Tax Court entered its judgment and decision, pursuant to its Rule 50, wherein it found deficiencies in income and excess profits tax for the year 1939 in the amounts of \$151.53 and \$66.18, respectively.

The Tax Court by its decision sustained the Petitioner's contention that the Commissioner erred in including in gross income \$2,700 as gain on the retirement of bonds, but sustained the Commissioner in his allowance of only \$3,291.90 for depreciation instead of \$9,436.97 as contended for by the taxpayer. An appeal to the United States Circuit Court of Appeals for the Fifth Circuit was duly taken by the Petitioner herein from the judgment of the Tax Court (R. 48). No appeal was taken by the Commissioner from that part of the finding and judgment of the Tax

Court which was adverse to him. The judgment of the Tax Court was affirmed (R. 77) in an opinion filed April 19, 1945 (R. 72-76).

In reaching the conclusion that the depreciation as allowed by the Commissioner was correct and that no additional allowance should be made for obsolescence the Court of Appeals held that, for the taxpayer to receive relief by way of an additional allowance for obsolescence, "he must show that the useful life of the property has been shortened and that the deduction for depreciation which covers ordinary wear and tear will not be sufficient to restore the cost of the property before its usefulness is at an end" (R. 75). As authority for its decision the Court cited and relied upon the **Revenue Act of 1926, section 234 (a) (7), 1944 Stat. 1942; Revenue Act of 1928, 23 (k), 26 U. S. C. A., section 23 (l), and State Line and Sullivan R. Co. v. Phillips, 90 F. (2d) 652 (R. 15)**. The Court wholly ignored, failed to discuss, and failed to distinguish, apply or follow the prior authoritative decisions of this Court which this Petitioner had urged were applicable and controlling and in which cases this Court had allowed a deduction for obsolescence without any showing by the taxpayer that the useful life¹ of the property involved had been shortened. Moreover, this Court had further expressly held that obsolescence may arise from things which operate to cause the property to suffer diminution in value and hence had allowed obsolescence where the evidence had shown that the useful life of the property was not impaired, but only its "special purpose" life had suffered such impairment.

¹ The crux of the question is "what constitutes useful life?" The Tax Court and the Court of Appeals gave "useful life" a meaning practically synonymous with physical life. As so used there could never be such a thing as obsolescence of a building, for a building can theoretically always be used for some purpose so long as it has physical existence. Obviously "useful life" when used in reference to a "special purpose" building can contemplate only its "special purpose" life. Thereafter it ceases to exist as a "special purpose" building.

See also: Extensive quotation from Dewing, Financial Policy of Corporations, Appendix, *infra*, for a full discussion of the nature and proof of obsolescence.

The decisions of this Court just alluded to are **U. S. Cartridge Co. v. U. S.**, 284 U. S. 551, 76 Law. Ed. 431, and **Burnet v. Niagara Falls Brewing Co.**, 282 U. S. 548, 75 Law. Ed. 594.

The necessary effect of the decision of the Court of Appeals in this case is to disregard, violate and conflict with the principles announced by this Court in **U. S. Cartridge Co. v. U. S.**, supra, and **Burnet v. Niagara Falls Brewing Co.**, 282 U. S. 548, 75 Law. Ed. 594, in that the Court of Appeals in this case placed upon the Petitioner the burden of furnishing proof that the useful (physical) life of the building in question had been shortened, whereas this Court, by its prior decisions in the above cited cases, had clearly held that the only conditions precedent to entitle a taxpayer to obsolescence for a "special purpose" building is to show that some event over which the taxpayer has no control has taken place which impairs its life as a "special purpose" building as distinguished from impairing its physical life. This Court in the **Cartridge Co. case**, supra, said "obsolescence may arise from * * * things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value." This Court also said, in **Burnet v. Niagara Falls Brewing Co.**, supra:

"In determining the proper deduction for obsolescence there is to be taken into consideration the amount properly recoverable at the end of its service by putting the property to another use or by selling it as scrap or otherwise. There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used and useable for any purpose before any allowance will be made for obsolescence."

B.

**STATEMENTS DISCLOSING BASIS OF
JURISDICTION.**

(1) The original date of the judgment to be reversed is April 19, 1945 (R. 72). Petition for rehearing was filed May 5, 1945, within the time provided by the rules of the United States Circuit Court of Appeals (R. 78), and the petition for rehearing was denied May 15, 1945 (R. 81).

(2) The jurisdiction of this Court is based upon Judicial Code Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A. Title 28, Section 347.

C.

QUESTIONS PRESENTED.

(1) Whether a taxpayer, owner of a "special purpose" building, upon the happening of an event over which the taxpayer has no control and which destroys its use as a "special purpose" building, is entitled to an allowance for obsolescence resulting therefrom, or whether the taxpayer must further show that the actual useful life of the building for all purposes, as distinguished from its "special purpose" life, has been shortened.

(2) In the interest of brevity (**Rule 38, para. 2; Furness, Withy Co., Ltd., v. Lange-Tsze Insurance Association, Ltd., 242 U. S. 430**), Petitioner does not at this time set forth all of the questions which will be urged in the argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such questions, but in order to comply with the rule of this Court requiring that all issues upon which a decision is requested be presented in the petition for certiorari (**Gunning v. Cooley, 281 U. S. 90, 98**), Petitioner here refers to and incorporates into this petition all of the matters presented in its assign-

ments of error in its petition for review by the Fifth Circuit Court of Appeals (R. 52-53) with the same force and effect as if herein set out in full.

D.

**REASON RELIED UPON FOR THE ALLOWANCE
OF THE WRIT.**

Because the Circuit Court of Appeals has made a clear-cut mistake of law of real importance and has decided an important question of the law of Federal taxation in conflict with the prior and applicable decisions of this Court in **U. S. Cartridge Co. v. U. S.**, supra, and **Burnet v. Niagara Falls Brewing Co.**, supra.

E.

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit herein applied for should be granted.

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